

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Not to be released

FOR MR. JUSTICE ROBB.

TRANSCRIPT OF RECORD.

COURT OF APPEALS, DISTRICT OF COLUMBIA.

October TERM, 192*4*.

No. 4061.

52

No. *5*, SPECIAL CALENDAR.

UNITED STATES, APPELLANT,

VS.

JOHN B. KELEHER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 30, 1923.

and 8

Oct. 7, 1924

M-R-S.

COURT OF APPEALS, DISTRICT OF COLUMBIA

— TERM, 192—.

No. 4061.

No. —, SPECIAL CALENDAR.

UNITED STATES, APPELLANT,

vs.

JOHN B. KELEHER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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SUPREME COURT OF THE DISTRICT OF COLUMBIA.

UNITED STATES, APPELLANT,	}	Criminal No. 41162.
vs.		
JOHN B. KELEHER, DEFENDANT.		

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed May 5, 1923.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

UNITED STATES	}	Criminal No. 41162.
vs.		
JOHN B. KELEHER.		

1st. The petitioner, John B. Keleher, respectfully represents to the courts the following facts:

2nd. That on the first day of May, 1923, this petitioner was residing in apartment #401, of the Chaumont Apartment House; located at 1336 Eye Street Northwest, in the city of Washington, District of Columbia, and had been so residing for sometime past.

3rd. The petitioner alleges that on the first day of May, 1923, without warrant or authority in law so to do, one E. W. Brown, a member of the Metropolitan police department, and other officers of the United States Government, unlawfully entered with force the said apartment of the petitioner, and unlawfully searched the same and unlawfully removed therefrom certain telephone instruments, tables, books, papers, slips of papers, cards, memoranda, a more particular description of which this petitioner is unable to give, as well as other property belonging to this petitioner, which at this time he unable to recall. Daniel Sullivan was not among those who so unlawfully entered and searched the said premises of the petitioner.

2 4th. Petitioner alleges that the said entry and search of the said premises was unlawful; was without authority under the Constitution of the United States.

Wherefore the petitioner prays that an order may be entered herein requiring the said E. W. Brown, or the United States marshal, or any other officer of the United States who may be in possession of the said property of the petitioner, to forthwith return the same to him.

JOHN B. KELEHER.

DISTRICT OF COLUMBIA, to wit:

John B. Keleher, being first duly sworn, made oath that the allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

JOHN B. KELEHER.

Sworn to and subscribed before me this 4 day of May, 1923.

[SEAL.]

BERTHA MAY GRAF,
Notary Public, D. C.

T. MORRIS WAMPLER,
Atty. for Petitioner.

Service accepted 5/5/23.

Per PEYTON GORDON.
M. P. M.

Motion.

Filed May 5, 1923.

* * * * *

Now comes John B. Keleher, and moves the court to enter an order herein requiring the delivery forthwith to the petitioner of the property set forth in the petition filed herein.

T. MORRIS WAMPLER,
Attorney for Petitioner.

To Hon. PEYTON GORDON,
U. S. Attorney, Washington, D. C.

Please take notice that the above-mentioned case will be called to the attention of Mr. Justice Bailey, Criminal Court Number two, on Friday, May 11, 1923, at 10 a. m. or as soon thereafter as counsel may be heard.

T. MORRIS WAMPLER,
Attorney for Petitioner.

Service accepted 5/5/23.

PEYTON GORDON.
Per M. P. M.

Motion to quash search warrant.

Filed May 5, 1923.

* * * * *

Now comes the defendant and moves the court to quash the search warrant issued herein for the reason that the same is void upon its face, because there is no warrant or authority in law for either the issuance or the execution thereof; because the person to whom a paper writing herein designated a search warrant was directed did not participate in the search thereunder, and was not present when the search was made.

T. MORRIS WAMPLER,
Attorney for Defendant.

To honorable PEYTON GORDON,
U. S. Attorney, Washington, D. C.

4 Please take notice that this case will be called to the attention of the court, Mr. Justice Bailey, on Friday, May 11, 1923, at 10 a. m., or as soon thereafter as counsel may be heard.

T. MORRIS WAMPLER,
Attorney for Defendant.

Service accepted 5/5/23.

PEYTON GORDON.
Per M. P. M.

Motion to suppress the use of property as evidence.

Filed May 5, 1923.

* * * * *

Now comes the defendant and moves the court to suppress the use as evidence before the grand jury of the District of Columbia, of any of the property of John B. Keleher seized by officers of the United States in his premises #401, the Chaumont Apartment House, 1336 Eye Street, Northwest, on the first day of May, 1923, because the same was unlawfully seized and the use of the same before the grand jury would be in violation of the rights of the defendant under the Constitution of the United States.

T. MORRIS WAMPLER,
Attorney for Defendant.

To Hon. PEYTON GORDON,
U. S. Attorney, Washington, D. C.

Please take notice that the above motion will be called to the attention of the court, Mr. Justice Bailey, on Friday, May 11, 1923, at 10 a. m., or as soon thereafter as counsel may be heard.

T. MORRIS WAMPLER,
Attorney for Defendant.

5 Service accepted 5/5/23.

PEYTON GORDON.
Per M. P. M.

Answer.

Filed May 16, 1923.

* * * * *

Now comes Robert C. Jackson, who, answering the petition of the defendant filed herein, respectfully states as follows:

1. That affiant admits the facts stated in paragraph 2 of said petition.

2. Answering the allegations set forth in paragraph 3 of said petition, affiant admits that one E. W. Brown and others entered the apartments of said defendant on May 1, 1923, but denies that said entry was unlawful or accomplished with force, or that the search and the removal of certain property therefrom was unlawful; but affiant specifically states that the said entry, search, and seizure were

made under and by virtue of a search warrant issued out of the police court of the District of Columbia, and that said search warrant was served on the said defendant at the time of said entry, a copy of which said warrant is hereto attached and marked "Exhibit A" and made a part hereof.

3. Affiant denies the allegations contained in paragraph 4 of said petition, and alleges that said entry and search were lawful.

4. And affiant further alleges that said entry and search
6 were made under and by virtue of a search warrant issued out of the police court of the District of Columbia; that the said defendant was thereafter arrested under and by virtue of the said warrant, and that an information charging said defendant with violation of section 865 of the Code of Laws for the District of Columbia has been made out and filed in said police court of the District of Columbia.

Wherefore affiant alleges that said search and seizure were lawfully made, and that any action concerning the same should be brought in said police court of the District of Columbia; and affiant therefore prays that the petition herein be dismissed.

ROBERT C. JACKSON.

DISTRICT OF COLUMBIA, ss:

Robert C. Jackson, being first duly sworn according to law, on oath deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and that the allegations contained therein are true to the best of his knowledge and belief.

ROBERT C. JACKSON.

Subscribed and sworn to before me this 16th day of May, 1923.

MORGAN H. BEACH, *Clerk.*

By F. E. CUNNINGHAM, *Asst. Clk.*

7

EXHIBIT A.

Filed May 16, 1923.

In the police court of the District of Columbia.

Aff. No. 132780.

DISTRICT OF COLUMBIA,

County of Washington, ss:

To the major of police of the District of Columbia, greeting:

Whereas it appears by the information and oath of William Horn that there are concealed on the said premises 401, Chaumont Apartment, 1336 Eye Street, Northwest, in the District of Columbia, personal property, chattels and instruments, to wit: Certain devices and apparatus, kept for the purpose of unlawful gaming; betting, and gambling slips; certain money, viz, N-95384406-A, N-53361957-A, R-10856893-A, N-62400953-A, R-36928722-A, being one-dollar bills in the national currency of the United States, and one five-dollar bill in money numbered U-294521-E, memoranda of bets, books of entry of bets and wagers, and other paraphernalia connected with the maintaining of a place for the making of bets, books, and pools on the

result of trotting and running races of horses as aforesaid, and that the said William Horn hath probable cause to suspect, and does suspect, that the said articles described above are now concealed in the premises of one John Keleher, known as number apartment 401, Chaumont, 1336 Eye St. N. W., in the City of Washington, in the County and District aforesaid.

These are, therefore, in the name of the United States, to authorize and require you, with the necessary and proper assistance, to enter into the said premises and there diligently search for the said goods, and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and the body of the said John Keleher before the police court of the District of Columbia, to be disposed of and dealt with according to law.

Witness the Hon. Robert Hardison and John P. McMahon, judges of the police court of the District of Columbia, and the seal of said court, this first day of May, in the year of our Lord one thousand nine hundred and twenty-three.

P. W. GARRETT,
Deputy clerk of the police court, D. C.

8 No. —.

U. S. search warrant to search premises of John Keleher
Apt. 401, Chaumont Apt., 1336 Eye St. NW., D. C.

Search made and — p. m. —.

Let search warrant issue this May 1st, 1923.

ROBERT HARDISON,
J. P. C., D. C.

- 1 check book.
- 2 books of record.
- 1 metal box of slips.
- 1 wooden box card system.
- 15 envelopes containing slips, etc.
- 1 telephone register.
- 2 pocket of telephone number on cards.
- 1 pocket adding machine records.
- 1 check perforator.
- 4 wooden horses.
- 7 telephone and extra parts.
- 6 buzzers.
- 2 switchboards and switches.
- 1 pencil sharpener.
- 4 clip boards.
- 1 waste basket.
- 1 bundle of white paper.
- 1 table of boards and phone box.
- \$40.00 marked money.
- \$20.00 bill No. G-31331920-A and \$20.00 bill No. K-1726758.
- 2 slips in large envelope that agent played.

Seized from Apt. 401, Chaumont Apt., 1330 I St. NW., May 1st, 23, by officers of 1st precinct about 5.30 p. m.

G. W. WORRELL, M. P. # 1,
Washington, D. C.

Memorandum opinion.

Filed July 19, 1923.

* * * * *

In each of these two cases I am of the opinion that the rule to show cause why a mandamus should not be issued should be discharged. I think that the judge of the police court is an officer having power to inquire into the offenses in respect to which the warrants were issued.

In the Keleher case the search was made by an officer other than the one to whom the warrant was addressed. As I think that the provisions of the espionage act covering the issuance and service of search warrants should be construed in *pari materia* with those of the District of Columbia Code, the service of the warrant was illegal and the property seized should be returned to the owner. I think this court has jurisdiction of the motion for the return of the property, as an indictment could be based upon the offense charged in the search warrant.

In the Burrows case the service of the warrant was illegal for the same reason and the warrant itself was defective in failing to name the defendant. The answer of the district attorney states that the service was made under the warrant. The affidavit exhibited with the answer states that when the premises were searched certain parties were found therein apparently engaged in making bets, etc., that said parties were placed under arrest and were then
10 searched. It does not state that the defendant was among those apparently engaged in making bets, etc., nor does it set out facts to show that the officer had reasonable grounds to believe that a felony was being committed. It is doubtful also whether when a search warrant has been unlawfully issued for searching premises, it can be used as a cloak to justify an officer making an arrest for an offense committed in his presence where the offense is of the same nature as that charged in the warrant.

For these reasons an order will be made directing a return of the property in each of these cases.

JENNINGS BAILEY,
Justice.

Order for return of property.

Filed July 25, 1923.

* * * * *

Upon consideration of the petition filed herein, it is by the court this 25th day of July, 1923,

Ordered that all property taken from the petitioner's apartment, No. 401, Chaumont Apartment House, 1336 I Street NW., in the city of Washington, District of Columbia, on the 1st day of May, 1923, by police officers, be forthwith returned to the said petitioner, John B. Keleher, or to his attorney of record.

JENNINGS BAILEY,
Justice.

Accept service, July 24, 1923.

CHAS. S. BAKER.

11 From the foregoing order the United States in open court notes an appeal, which is granted.

JENNINGS BAILEY,
Justice.

Order allowing special appeal.

Filed Oct. 18, 1923.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 883, original. October term, 1923.

UNITED STATES, PETITIONER,	}	Criminal, No. 41162.
VS.		
JOHN B. KELEHER.		

On consideration of the petition for the allowance of a special appeal in the above entitled cause from the order of the Supreme Court of the District of Columbia entered therein on May 25, 1923, it is ordered by the court that said petition be, and the same is hereby, granted, and the special appeal allowed as prayed.

Per Mr. Chief Justice SMYTH.

OCTOBER 6, 1923.

A true copy.

Test:

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Assignment of errors.

Filed Oct. 16, 1923.

* * * * *

Now comes Peyton Gordon, attorney of the United States in and for the District of Columbia, and for errors in the above entitled cause assigns the following:

12 1. The court erred in ruling and holding that it had jurisdiction to hear and determine the issues raised by the petition of John B. Keleher.

2. The court erred in ruling and holding that the provisions of the espionage act covering the issuance and service of search warrants should be construed in pari materia with the provisions of law covering the issuance and service of search warrants in force only in the District of Columbia.

3. The court erred in ruling and holding that the search warrant under which the property described in the proceedings herein was seized was illegal.

4. The court erred in ruling and holding that the service of the said search warrant was illegal.

5. The court erred in ruling and holding that it had jurisdiction to make and pass the order made and passed on July 25, 1923.

6. The court erred in making and passing the said order of July 25, 1923.

PEYTON GORDON,
*Attorney of the United States
in and for the District of Columbia.*

13

Designation of record.

Filed Oct. 19, 1923.

* * * * *

The clerk, in preparing the record on appeal, will please include the following:

1. Petition for return of property.
2. Supporting motion.
3. Motion to quash search warrant.
4. Motion to suppress the use of property as evidence.
5. Answer of Robert C. Jackson.
6. Memorandum opinion of Bailey, J., granting petition.
7. Order returning property.
8. Notation of appeal in open court.
9. Assignment of errors.
10. Notation of allowance of special appeal.
11. This designation.

PEYTON GORDON,
United States Attorney.

Service of copy of the above designation acknowledged this 17th day of October, 1923.

_____,
Attorney for Defendant-Appellee.

14 SUPREME COURT OF THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in criminal cause No. 41162 wherein United States is plaintiff and John B. Keleher is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of October, 1923.

[SEAL.]

MORGAN H. BEACH,
Clerk.

[Indorsed on cover: District of Columbia Supreme Court. No. 4061. United States, Appellant vs. John B. Keleher. Court of Appeals, District of Columbia. Filed Oct. 30, 1923. Henry W. Hodges, clerk.]

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FOR MR. JUSTICE ROSS

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Nos. 4061 and 4062 *H. Hodges*

**In the Court of Appeals of the District of
Columbia.**

OCTOBER TERM, 1925.

Nos. 2 AND 1, SPECIAL CALENDAR.

UNITED STATES, APPELLANT,

v.

JOHN B. KEENE, APPELLEE,

AND

UNITED STATES, APPELLANT,

v.

CLAUDE L. BURROWS, APPELLEE,

BRIEF FOR APPELLANT.

WITNESSETH

THAT JOHN B. KEENE,
JOHN B. KEENE,
AND CLAUDE L. BURROWS,

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1923.

UNITED STATES	}	No. 4061.
v.		No. —, Special
JOHN B. KELEHER.		Calendar.

UNITED STATES	}	No. 4062.
v.		No. —, Special
CLAUDE L. BURROWS.		Calendar.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The above cases have been joined in the preparation of the following brief, for the reason that they are practically identical in fact and in law.

The appeal is taken from the following orders entered in the Supreme Court of the District of Columbia in the above causes on July 25, 1923:

UNITED STATES *v.* JOHN B. KELEHER.

ORDER.

Upon consideration of the petition filed herein, it is by the Court this twenty-fifth day of July, 1923,

74140-23

185-4. S. 83 / *Reverend*
Rodger v U. S. *165-4526*

Ordered that all property taken from the petitioner's apartment, No. 401, Chaumont Apartment House, 1336 I Street NW., in the City of Washington, District of Columbia, on the 1st day of May, 1923, by Police officers, be forthwith returned to the said petitioner, John B. Keleher, or to his attorney of record.

JENNINGS BAILEY,

Justice.

Upon consideration of the petition filed herein, it is by the court this 25 day of July, 1923,

Ordered that the property mentioned in the petition, namely two twenty dollar bills taken from the petitioner by police officers on the first day of May, 1923, be forthwith returned to the petitioner Claude L. Burrows, or to his attorney of record.

JENNINGS BAILEY,

Justice.

1. The foregoing orders were passed upon the petitions of the said John B. Keleher and the said Claude L. Burrows and the answers and amended answers of the United States.

The petition of the said Keleher, filed in the Supreme Court of the District of Columbia on May 5, 1923, alleged in substance that, on May 1, 1923, he resided in the Chaumont, Apartment No. 401, at 1336 I Street Northwest, in the District of Columbia; and on that day, without any warrant of authority, one E. W. Brown, a member of the Metropolitan

Police Department, and other officers of the United States Government, with force, unlawfully entered the said apartment, searched the same, and removed therefrom certain telephone instruments, tables, books, papers, slips of paper cards, and memoranda, a more general description of which he was unable to give; and that Daniel W. Sullivan was not among those who so unlawfully entered and searched said premises.

The petition of the said Burrows alleged in substance that, on May 1, 1923, he was unlawfully searched by one George W. Worrell, a federal officer, and other officers of the United States, and that there was taken from him a pocketbook, which was in his pocket, containing the sum of forty dollars, being two 20-dollar bills; and further, that at the time of said search, he was not under arrest, nor engaged in any unlawful act.

2. There were also filed in said causes by each of said appellees three certain motions, asking the Court to return the property alleged to have been seized, to quash the search warrant, and to suppress the use as evidence of any property so seized.

The United States filed an answer and an amended answer to the petition of the said Keleher, admitting that said E. W. Brown and certain other officers entered the said premises and seized certain personal property therein found, the same being more fully described hereinafter, but denied that the entry or the seizure of the said property was unlawful, setting

forth that the same were made under the authority of a certain search warrant issued out of the Police Court of the District of Columbia, which said search warrant was served on the defendants at the time of said entry; the said search warrant and return being of tenor as follows:

In the Police Court of the District of Columbia.
Aff. No. 132780.

DISTRICT OF COLUMBIA,

County of Washington, ss.:

To the Major of Police of the District of Columbia, Greeting:

Whereas, it appears by the information and oath of William Horn, that there are concealed on the said premises, 401 Chaumont Apartment, 1336 Eye Street Northwest, in the District of Columbia, personal property, chattels, and instruments to wit, certain devices and apparatus, kept for the purpose of unlawful gaming, betting, and gambling slips, certain money, viz, N-95384406-A, N-53361957-A, R-10856893-A, N-62400953-A, R-36928722-A, being one dollar bills in the National Currency of the United States, and one five dollar bill in money numbered U-294521-E; memoranda of bets, books of entry of bets and wagers and other paraphernalia connected with the maintaining of a place for the making of bets, books, and pools on the result of trotting and running races of horses as aforesaid, and that the said William Horn hath probable cause to suspect, and does suspect, that the said articles described above

are now concealed in the premises of one John Keleher, known as number Apartment 401, Chaumont, 1336 Eye St. NW., in the City of Washington, in the County and District aforesaid.

These are, therefore, in the name of the United States to authorize you and require you, with the necessary and proper assistance, to enter into the said premises and there diligently search for the said goods, and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and the body of the said John Keleher before the Police Court of the District of Columbia, to be disposed of and dealt with according to law.

Witness the Hon. Robert Hardison and John P. McMahon, Judges of the Police Court of the District of Columbia, and the seal of said Court, this first day of May, in the year of our Lord one thousand nine hundred and twenty-three.

P. W. GARRETT,
Deputy Clerk of the Police Court, D. C.

Return was made to the above search warrant as follows:

No. —	1 check book.
	2 books of record.
	1 metal box of slips.
	1 wooden box card system.
	15 envelopes containing slips, etc.
U. S. search warrant	1 telephone register.
to search premises	2 pocket of telephone number
of John Keleher,	on cards.
Apt. 401, Chaumont	1 pocket adding machine rec-
Apt., 1336 Eye St.	ords.
NW., D. C.	1 check perforator.
Search made and ..	4 wooden horses.
-----	7 telephone and extra parts.
-----	6 buzzers.
-----	2 switchboards and switches.
-----	1 pencil sharpener.
-----	4 clip boards.
-----	1 waste basket.
P. M.	1 bundle of white paper.
	1 table of boards and phone
	box.
Let Search Warrant	\$40.00 marked money.
issue This May 1st,	\$20.00 bill No. G-31331929-A
1923.	and \$20.00 bill No. K-
ROBERT HARDISON,	1726758.
J. P. C. D. C.	2 slips in large envelope that
	agent played.
	Seized from Apt. 401, Chau-
	mont.

An answer and an amended answer in similar form were also filed to the petition of the said appellee, Burrows, as will appear on pages 4 and 5 of the transcript of record in said cause.

3. Attached to and made a part of the amended answer of the United States to the petition of the appellee, Burrows, was an affidavit setting forth the facts and circumstances under which the said search

and seizure were made, which said affidavit is as follows:

DISTRICT OF COLUMBIA, ss:

Robert C. Jackson, being first duly sworn according to law, on oath deposes and says that he is a member of the Metropolitan Police of the District of Columbia; that he aided in the search of premises 401 Chaumont Apartments, 1336 Eye Street Northwest, District of Columbia, which said premises were entered under and by virtue of a search warrant issued out of the Police Court of the District of Columbia, on the first day of May, 1923; that when said premises were raided certain parties were found therein, apparently engaged in making bets, setting up gaming tables, and maintaining certain gambling devices in violation of Sections 865 and 869 of the Code of Laws of the District of Columbia; and that said parties were placed under arrest and were then searched, but affiant alleges that said entry and said search were accomplished without resistance or any violence whatever, and that upon the defendant, Claude L. Burrows, was found the sum of Forty Dollars in marked money; that is, money previously used by an agent of said Police in placing certain bets; and, further, affiant alleges that the property seized in said search was placed and now is in the hands of the United States Marshal in and for the District of Columbia.

ROBERT C. JACKSON.

Subscribed and sworn to before me this 29th day of May, A. D. 1923.

MORGAN H. BEACH, *Clerk*,
By F. E. CUNNINGHAM,
Ass't Clerk.

4. The two cases came on for final hearing on May 29, 1923. Among other points made at the said hearing, it was contended that the said search warrant did not comply with Title XI of the Espionage Act, which was applicable, together with Section 911 of the Code of Laws of the District of Columbia, in that the said search warrant, while directed to the Major of Police of the District of Columbia, was not served by the person to whom directed, but served by the said E. W. Brown, as heretofore stated.

5. It was contended by counsel for the Government that Title XI of the Espionage Act, while a general statute, was applicable to the offenses therein denounced, and was not applicable to searches and seizures of this nature, and that Section 911 of the Code alone controlled. It was further maintained that the Supreme Court of the District of Columbia was not in a position to consider the question because of the fact that the search warrant had been issued out of the Police Court of the District of Columbia, returned thereto, and was at the time pending therein; that the very petition and motions under consideration had not been filed in the former Court for the reason that there was no cause pending there.

6. The Court took the matter under advisement, and memoranda were filed by the defense and by the Government.

7. Thereafter, to wit, on July 19, 1923, a joint memorandum opinion was filed in the two original cases. The opinion was as follows:

In the Supreme Court of the District of Columbia. United States v. Keleher; United States v. Claude L. Burrows.

In each of these two cases I am of the opinion that the rule to show cause why a mandamus should not be issued should be discharged. I think that the judge of the Police Court is an officer having power to inquire into the offenses in respect to which the warrants were issued.

In the Keleher case the search was made by an officer other than the one to whom the warrant was addressed. As I think that the provisions of the Espionage Act covering the issuance and service of search warrants should be construed in *pari materia* with those of the District of Columbia Code, the service of the warrant was illegal and the property seized should be returned to the owner. I think this Court has jurisdiction of the motion for the return of the property, as an indictment could be based upon the offense charged in the search warrant.

In the Burrows case the service of the warrant was illegal for the same reason, and the warrant itself was defective in failing to name the defendant. The answer of the district attorney states that the service was made under the warrant. The affidavit exhibited with the answer states that when the premises were searched certain parties were found therein *apparently* engaged in making bets, etc.; that said parties were placed under arrest and then searched. It does not state that the defendant was among those *apparently*

engaged in making bets, etc., nor does it set out facts to show that the officer had reasonable grounds to believe that a felony was being committed. It is doubtful also whether, when a search warrant has been unlawfully issued for searching premises, it can be used as a cloak to justify an officer making an arrest for an offense committed in his presence where the offense is of the same nature as that charged in the warrant.

For these reasons an order will be made directing a return of the property in each of these cases.

JENNINGS BAILEY,
Justice.

The order above set forth was thereupon issued, and from said order this appeal is taken.

ARGUMENT.

The various assignments of error will be considered together. The principal question for determination is whether or not Section 911 of the Code, together with the provisions of the Revised Statutes of the United States relating to the District of Columbia in regard to search warrants, have been superseded or modified by Title XI of the Espionage Act, approved June 15, 1917.

In approaching the question, it is well to keep in mind the fact that search warrants are authorized under Section 911 in a variety of cases, including—

* * * articles stolen, taken by robbers, embezzled or obtained by false pretenses, forged or counterfeited coin, stamps, labels,

* * * or any gaming table, device, or apparatus kept for the purpose of unlawful gaming, or any lottery tickets or lottery policies * * *.

On the other hand, counsel suggests that Title XI covers the present instance by authority of paragraph 2, Section 2, which states that a search warrant may be issued—

* * * when property was used as the means of committing a felony.

The only other instances provided for are under paragraphs 1 and 3, of Section 2, where—

* * * when the property was stolen or embezzled in violation of the law of the United States—

And—

* * * when the property, or any paper, is passed, controlled, or used in violation of Section 22 of this Title.

A comparison of the relative scope of the two sections immediately reveals the limited field covered by Title XI as opposed to the all-inclusive provisions of Section 911 of the Code. It also reveals the fact that Section 911 of the Code provides for numerous crimes which are merely misdemeanors. It is therefore difficult to imagine that Congress intended Title XI of the Espionage Act to supersede or modify the specific provisions of Section 911 of the Code.

Cases relied upon by counsel for the appellees in the Court below, such as *United States v. Borkowski*, 268 Fed. 411; *United States v. Yuck Kee*, 281 Fed. 231; *Silverthorne Lumber Company v. United States*,

251 U. S. 391, etc., are cases involving alleged violations of the Volstead Act, to which Title XI of the Espionage Act is made applicable by specific provision; and cases involving violations of general Federal statutes such as the Sherman Anti-Trust Laws, laws concerning the deportation of aliens, etc. In the cases mentioned there is no discussion of implied modification or repeal of any local statute by authority of the passage of the Espionage Act. In fact, the Courts apparently take the attitude that former statutes providing for the issuance of search warrants, even where general in their scope, have not been repealed by the passage of Title XI; and well they might do so, for, as stated in Section 23 thereof—

nothing contained in this Title shall be held to repeal or impair any existing provisions of law regulating search warrants and the issuance of search warrants.

Thus, in *Woods v. United States*, 279 Fed. 706, February 9, 1922, the Circuit Court of Appeals for the Fourth Circuit discussed at length the sufficiency of a search warrant to search for property held in fraud of the revenue of the United States, drawn in the language of Section 3462 of the Revised Statutes. The Court held the search warrant defective in that, while it complied with the terms of Section 3462, it failed to satisfy the provisions of the Fourth Amendment to the Constitution, which reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not

be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and properly describing the place to be searched, and persons or things to be seized.

No mention whatever was made of Title XI of the Espionage Act in the discussion of said case.

Also in the recent case of *United States v. Innelli*, decided February 26, 1923 (286 Fed. 371), the court, in discussing the search-warrant provisions of the Espionage Act, said:

The Volstead Act (41 Stat. 305) imposes only two limitations. One is that warrants for a violation of that law shall issue to enter private homes only in exceptional cases. The other is that they shall be issued in accordance with the Act of June 15, 1917 (Espionage Act). This takes us to that law. *It is general in its terms, but was enacted with special reference to espionage cases.* (Italics and parentheses supplied.)

Lastly, the question is governed by the fundamental rule that specific legislation shall not be impliedly modified, impaired, or repealed by subsequent general legislation, and unless the intention to repeal the specific and local legislation is clearly demonstrated it will remain in force and effect. This rule is elementary, says the Supreme Court in *Ex Parte United States*, 226 U. S. 420:

* * * that a special and particular statutory provision is not repealed by a general law unless the repeal be express or the implications to that end be irresistible;

and in *Petri v. Creelman Lumber Company*, 199 U. S. 487, the Supreme Court said:

Especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation.

In the case of *Kleindienst v. United States*, 46 W. L. R. 773, where the defendant had been sentenced under Section 316 of the Federal Penal Code to serve a period of three years in the penitentiary, this Court said:

One other question requires attention at this time. The court sentenced defendant under Section 316 of the Federal Penal Code to serve a period of three years in the penitentiary. Defendant contends that Section 874 of the District Code applied, under which he might have been fined not to exceed \$500.00 or imprisoned not exceeding one year, or both. In *Johnson v. United States*, 38 App. D. C. 347; 40 Wash. Law Rep. 178; 225 U. S. 405, it was ruled that the two Codes, having definite territorial operation, may subsist together; that the Federal Code embraces general legislation of general operation, while the District Code embraces local legislation of local operation; and that an intent to affect or repeal the latter by enactment of the former must clearly appear and will not be implied. Chapter 13 of the Federal Code, in which appears Section 315, ordains that "except as otherwise expressly provided" the offense defined in the chapter shall be punished as thereafter provided. Having in mind what was ruled in the Johnson

case, we are of the view that the quoted words embrace, and were intended to embrace, Section 874 of our Code. As pointed out in that case by both courts, apparently every prior enactment of Congress that in any way conflicted with the provisions of the Federal Code was in terms repealed. Section 874 was not mentioned in the repealed provisions. Moreover, since every section in Chapter 13 of the Federal Code provides punishment for violation of its provisions, the phrase quoted is meaningless unless given the interpretation we have placed upon it. We think it should be given that interpretation.

Attention is called to the obvious analogy between the above proviso and Section 23 of Title XI of the Espionage Act. Turning to the *Johnson case*, 225 U. S. 405, in which a similar conflict between the local and general statutes applicable to sentence for murder arose, the Supreme Court of the United States stated:

Congress certainly in enacting the District Code recognized the expediency of separate provisions for the District of Columbia. It was said at the bar and not denied that the District Code was not only the work of the lawyers of the District having in mind the needs of the District but of its citizens as well, expressed through various organizations and bodies of them.

Section 26, Comp. Stat. D. C., page 480, under the title "Police Court," provides:

In cases arising out of violations of any of the ordinances *or laws* of the District in force

therein, process shall be directed to the major of police, who shall execute the same and make return thereof in like manner as in other cases.

Sections 62 and 63, Comp. Stat. D. C., pages 378 and 379, provide, in part, as follows:

SEC. 62. The *commissioners* (members of the board of police) and the police force shall possess in every part of the District all the common law and statutory powers of constables * * *.

SEC. 63. Any warrant for search or arrest, issued by any magistrate of the District, shall be executed in any part of the District by any member of the police force, without any backing or endorsement of the warrant, and according to the terms thereof; * * *.

If Section 23, Title XI, of the Espionage Act does not modify the general law relating to search warrants and their execution in force in the District of Columbia, it necessarily follows that the search warrant herein described was valid and legally executed and that the orders of the Court below directing the return of the property seized thereunder were erroneous.

Wherefore, it is respectfully urged that the orders herein, directing the return of the property seized, be reversed and set aside.

Respectfully submitted.

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